UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

ROBERT L. TOLER,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
DC-0752-07-0088-I-1

DATE: March 6, 2007

Martin Kaplan, Esquire, Raleigh, North Carolina, for the appellant.

Jennifer B. Toler, Esquire, Cherry Point, North Carolina, for the agency.

BEFORE
Sarah P. Clement
Administrative Judge

INITIAL DECISION

The appellant has filed an appeal of his 60-day suspension on charges of violating the medical restrictions associated with his worker's compensation claim. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. §§ 7511(a)(1)(A), 7512, 7513(d), and 7701(a). For the following reasons, the agency's action is AFFIRMED.

BACKGROUND

The appellant is employed as an Aircraft Electrician, WG-2892-10, at the Fleet Readiness Center East, Cherry Point, North Carolina. His primary duties in that position involve installing, adjusting, testing, calibrating and repairing aircraft electrical systems and equipment on board fixed and rotary-wing aircraft.

See Appeal File (AF), Tab 4, Subtab 1, 4xx at 3. The physical effort required for the performance of his duties includes frequently climbing up and down ladders, check stands, work platforms, scaffolding and aircraft structures while making repairs or installations of equipment. He is required to stand for long periods of time, as well as kneel, bend, stoop and stretch. Frequently, the repairs or installations are in hard-to-reach places requiring awkward and strained positions. In addition, he is required to lift and carry aircraft electrical items weighing up to 20 pounds unassisted and up to 50 pounds with the assistance of lifting devices or other workers. *Id.* On August 19, 2004, the appellant injured his right foot when he slipped and fell while working inside the cabin of a CH-53 aircraft. AF, Tab 4, Subtab 4vv. The appellant was placed on light duty when he returned to work on August 23, 2004. On August 24, 2004, he filed a CA-1 claim for workers' compensation ("OWCP benefits") as a result of the injury, which was accepted on October 4, 2004. *Id.*, Subtabs 4vv, 4qq. In connection with his claim for OWCP benefits, the appellant also signed a Department of the Navy form concerning employees' rights and responsibilities for a work-related injury. That form, which the appellant signed and dated August 24, 2004, contained the following acknowledgment: "I must not violate any medical restrictions on or off the job." AF, Tab 4, Subtab 4uu.

The appellant began treatment for his foot injury with Dr. Thomas E. Curd, DPM, on September 13, 2004. AF, Tab 4, Subtab 4ss. Dr. Curd had the appellant begin a stretching regimen for the ligaments and tendons in his foot, and placed him on light duty at work for three weeks with limited walking, standing, lifting, stooping, bending and climbing. *Id.*, Subtabs 4rr, 4ss. On October 7, 2004, Dr. Curd placed the appellant on light duty for another month, consisting of sitting 15 minutes every hour, no heavy lifting greater than 25 pounds, limited stooping, and limited climbing. *Id.*, Subtab 4pp. He treated the appellant's foot with therapeutic injections and recommended he continue wearing his shoe inserts and doing his stretching exercises. On November 8,

2004, the appellant was seen and treated by Dr. Curd again, and light duty was continued for six more weeks. *Id.*, Subtab 4oo. The appellant was seen again on December 9, 2004, and again Dr. Curd recommended light duty for another six weeks. *Id.*, Subtab 4nn. The appellant was seen again on January 21, 2005, still complaining of soreness in his heel after he had been at work for about an hour, and worsening pain with increased activities. Dr. Curd prescribed orthotics for him and continued him on light duty "as previously prescribed" for an additional six weeks. *Id.*, Subtabs 4mm, 4ll.

On February 14, 2005, the appellant was assigned to light duty in the cable shop, primarily performing bench work. AF, Tab 4, Subtab 4a. When he was next seen by Dr. Curd, on February 22, 2005, the appellant received his orthotics and continued on light duty for another six weeks. Dr. Curd stated that the appellant was "to avoid climbing, stooping, and prolonged activities." *Id.*, Subtab 4kk. In April 2005, the appellant was injured in an all-terrain vehicle accident and was placed on additional medical restrictions for a lower back injury as a result of that accident. On June 1, 2005, the appellant was seen again by Dr. Curd and continued on light duty for another six weeks because of continuing foot pain with activity. *Id.*, Subtab 4hh. During this time, he was also seen by Dr. Tamara Babb, MD, for his lower back injury. She also placed him on restrictions including no prolonged standing, walking, bending, turning and twisting; no lifting over 10 pounds; no pushing or pulling with excessive force; no climbing ladders or scaffolding; no crawling; no repetitive squatting or kneeling; no jumping; and no overhead work. *Id.*, Subtabs 4ii, 4gg, 4ff, 4cc, 4bb. At the end of September 2005, Dr. Babb continued the appellant on these restrictions for an additional two months. On October 6, 2005, the appellant again saw Dr. Curd, complaining of continued pain in his heel, which worsened with increased activities. Dr. Curd continued him on light duty and scheduled a follow-up visit in 10 weeks. *Id.*, Subtab 4aa.

On December 1, 2005, Dr. Curd continued the appellant on light duty for an additional two weeks. *Id.*, Subtab 4z. Because the appellant had been on light duty for more than a year at this point, the agency requested additional information from Dr. Curd regarding diagnosis, prognosis and estimated time to return to full duty. *Id.*, Subtab 4y. Dr. Curd saw the appellant again on December 15, 2005, prescribed physical therapy, and recommended continued light duty for six more weeks. *Id.*, Subtab 4x. Dr. Curd also provided updated restrictions for the appellant including limited walking, standing, bending, stooping, pushing, pulling, and lifting, and no squatting or climbing. *Id.*, Subtab 4w. The appellant saw Dr. Curd again on February 2, 2006, still complaining of pain in his right foot, which worsened with increased activities particularly on hard surfaces. AF, Tab 4, Subtab 4v. Dr. Curd recommended continuation of light duty for an additional two to three months. *Id.*, Subtab 4u.

Because of a lack of work in the cable shop, the appellant was moved back to his permanent shop on February 13, 2006, where he was assigned low-level duties that could be done while sitting in a chair, in order to accommodate his medical restrictions. AF, Tab 4, Subtab 4c. On February 14, 2006, Dr. Curd continued the appellant's light duty, recommending in a written note, "Bench work; no working on aircraft—no climbing, kneeling or standing for prolonged periods of time." *Id.*, Subtab 4t.

On March 7, 2006, the agency learned that the appellant was building an addition on to his personal residence. An investigation was initiated, and surveillance by observers revealed that on March 18 and 25 and April 8, 2006, the appellant was climbing ladders, carrying sheets of plywood, hammering from a ladder, sawing and dragging wood, and performing other strenuous construction activities at his house. AF, Tab 4, Subtabs 4l, 4s. By letter dated August 23, 2006, the agency proposed his removal for violating his medical restrictions associated with his worker's compensation claim. *Id.*, Subtab 4k. The deciding official carefully reviewed the full record and concluded that the charges

involving the appellant's construction work on March 18 and 25 were sustained. He found that the appellant's medical restrictions prohibited him from climbing, yet the appellant had been observed climbing a ladder while working on his home addition on the specified dates. The deciding official did not sustain the specification concerning the appellant's activities on April 8, and limited his findings for the other two dates to the appellant's climbing on a ladder. He mitigated the proposed penalty of removal to a 60-day suspension. *Id.*, Subtab 4e. This appeal followed, in which the appellant denied the charge and disputed the nexus as well as the penalty. He also raised a due process claim, alleging that the deciding official relied on information not contained in the notice of proposed removal in sustaining the specifications at issue.

ANALYSIS AND FINDINGS

In an action taken under 5 U.S.C. § 7513, the agency has the burden of proving the merits of its charges by a preponderance of the evidence. The agency must also prove that its action is for such cause as promotes the efficiency of the service and that the penalty is reasonable. 5 U.S.C. §§ 7701(c)(1)(B) and 7513(a); *see Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 301 (1981). Here the appellant did not deny that he climbed a ladder while performing work on an addition to his house on the two dates in question, March 18 and 25, 2006. He denied that those activities violated his medical restrictions, however, and asserted that his off-duty activities had no connection with the efficiency of the service.

The appellant claimed that on the dates charged, he was no longer restricted from climbing. He pointed to Dr. Curd's handwritten medical slip dated February 14, 2006, which read as follows: "Limited Duty: Bench work; no working on aircraft—no climbing, kneeling, or standing for prolonged periods of time." AF, Tab 4, Subtab 4t. The deciding official stated that he construed this

note together with the more lengthy OWCP work capacity evaluation form that Dr. Curd completed on December 15, 2005, which clearly noted complete restriction (0 hours) from climbing or squatting. *Id.*, Subtab 4w. I find that the agency's interpretation of the appellant's restrictions is correct. The qualification "for prolonged periods of time" in Dr. Curd's informal, handwritten note of February 14 is associated with standing, not with climbing or kneeling, which are set off by commas and not qualified. Furthermore, Dr. Curd's more detailed, formal statement of the appellant's restrictions on the OWCP work capacity evaluation form dated December 15 clearly prohibited climbing altogether, limiting that activity to "0 hours." The appellant's argument that his doctor had permitted him to climb for limited periods of time in March 2006 is not persuasive or supported by the documentary evidence in the record. A review of the notes and reports prepared by Dr. Curd throughout his treatment of the appellant shows that the appellant continued to complain of pain in his foot that worsened with increased activity, particularly on hard surfaces, and that his injury had not fully healed in March 2006. *See, e.g.*, AF, Tab 4, Subtabs 4mm, 4kk, 4x, 4v. Indeed, in a report dated April 4, 2006, Dr. Curd stated that the appellant continued to report pain, numbness and tingling in his foot and had not reached medical maximum improvement. AF, Tab 4, Subtab 4p. The last lengthy medical note prepared by Dr. Curd before the dates at issue in this appeal, his report of treatment prepared on February 22, 2006, stated that the appellant "will remain on light duty as previously prescribed. He is to avoid climbing, stooping, and prolonged activities. He will return here in six weeks for follow-up evaluation and will call if he has any problems before then." AF, Tab 4, Subtab 4kk. There is no question that the appellant's work on the addition to his house on March 18 and 25, 2006, involving climbing on a ladder, violated his medical restrictions. I therefore find that the agency proved its charge.

The appellant also argued that there is no nexus between his off-duty conduct and the efficiency of the service. To prove nexus, the agency must show

that the action taken is for such cause as to promote the efficiency of the service. *See, e.g., Hatfield v. Department of the Interior*, 28 M.S.P.R. 673, 675 (1985). The charge here of violating his doctor's medical restrictions is based on off-duty conduct. In order to discipline an employee for off-duty conduct, an agency must establish a connection (or nexus) between the appellant's off-duty conduct and the efficiency of the service. *See* 5 U.S.C. § 7513(a); 5 C.F.R. § 752.403(a). To establish the required nexus, the agency must show that the off-duty conduct affected either the appellant's performance of his duties, his coworkers' performance of their duties, or the agency's mission. *See, e.g., Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987). The agency must thus show, in this case, that the appellant's off-duty work on his home addition not only violated his medical restrictions but also impaired his ability to perform his duties on the job, impaired his coworkers' ability to perform their duties, or adversely affected the agency's mission.

The deciding official, John Gatt, fully discussed and considered the issue of nexus in this case. He found that the appellant's disregard of his medical restrictions while working on his home addition could potentially have prolonged the recovery time for his injury and extended the time during which he could not perform the full range of his duties at work. However, whether or not the appellant's off-duty activities impeded the progress of his healing, Gatt found numerous other reasons to find nexus. He reasoned that the appellant's

> actions indicate you were, at a minimum, taking advantage of your restrictions to limit the duties you performed at work and receive easier assignments at work, while during the same time, building an addition to your home that required you to violate the medical restrictions imposed on you as a result of your Workers' Compensation claim. Your actions are completely unacceptable, in conflict with the Agency's mission, and violate the public trust.

AF, Tab 4, Subtab 4e at 3. The appellant's lack of candor struck at what the Board has called "the very heart of the employer-employee relationship," and thus "directly impacted the efficiency of the service." *Ludlum v. Department of*

Justice, 87 M.S.P.R. 56, 68 (2000), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002); *Stein v. U.S. Postal Service*, 57 M.S.P.R. 434, 441 (1993); 5 U.S.C. § 7513(a). In addition, the record shows that during the period at issue here, the appellant continued to insist on light duty at work, consisting of bench work, despite his ability to perform what were obviously more strenuous activities constructing his home addition on the weekends. *See, e.g.*, AF, Tab 4, Subtab 4c (affidavit of Andrew Moorer); Tab 18, Hearing Tape 2A (testimony of Albert Almore). Thomas Truitt, his supervisor in the cable shop from December 2005 to April 2006, remembered that the appellant declined to mop the shop floor when Truitt requested him to, responding that "he couldn't do that task because he was afraid he would hurt his foot." AF, Tab 4, Subtab 4b (Truitt's affidavit). As the agency noted, the appellant did not exercise the same amount of conscientiousness of his injured foot after working hours as he did while on the job. AF, Tab 9 at 2.

The appellant's inability to perform the full range of his duties at work obviously impacted the agency's mission of maintaining the readiness of the active duty military fleet aircraft. The deciding official noted, "The performance of the duties of your position directly contributes to the accomplishment of this Agency's mission in that regard." AF, Tab 4, Subtab 4e at 4. At the hearing, Gatt testified that the agency provides critical aircraft components primarily to the Marine Corps in combat theaters in Afghanistan and Iraq. He stated that the appellant's work as a WG-10 electrician was critical to this mission, and he had to rely on his whole resource pool to get the volume of work done. Thus the appellant's inability to perform his duties burdened the other employees in his line of work, since they must take on his duties to insure the work is done on schedule. Gatt noted that "when rumors start spreading that somebody is building a house off duty, yet being accommodated at work by being allowed to do benchwork while everyone else is working overtime, that is bad on morale." AF, Tab 18, Hearing Tape 1A. Gatt also noted that the appellant's disregard, or, worse, misrepresentation of his physical restrictions violated the public trust and

eroded the deciding official's trust and confidence in the appellant's "ability to carry out your duties as a Federal Employee in a way that is consistent with the efficiency of the Federal Service." *Id.*, Tab 4, Subtab 4e at 5-6. Conduct that violates the public trust and shakes supervisors' confidence in an employee has been found to have a clear nexus to the efficiency of the service. *See, e.g., Bahrke v. U.S. Postal Service*, 98 M.S.P.R. 513, 522 (2005); *Beck v. Department of Justice*, 67 M.S.P.R. 219, 224 *aff'd*, 70 F.3d 129 (Fed. Cir. 1995) (Table). I thus find that the agency established nexus in this case.

The appellant also argued that the penalty was too harsh. I disagree. The deciding official thoroughly discussed the specifications that he sustained and his reasons for reducing the penalty from removal to a 60-day suspension. He noted the seriousness of the appellant's misconduct, as discussed in more detail above, but felt that a lesser penalty than removal would allow the appellant to reevaluate his behavior and return to work with a more productive and positive outlook. AF, Tab 4, Subtab 4e at 6. Gatt noted that he wanted to get the appellant back on the job to perform a critical mission. AF, Tab 18, Hearing Tape 1A. The appellant appeared to argue, in his testimony at the hearing, that he was not aware that he was violating his medical restrictions during his off-duty hours, but I find this contention implausible and incredible. The appellant was in regular consultation with Dr. Curd and regularly brought back Dr. Curd's notes and reports continuing his light duty. The appellant had not been performing his duties as an electrician for a year and a half. He continued to complain of foot pain to his doctor, and he never advised his supervisors that he felt well enough to resume his regular duties. Instead he continued to perform bench work and other low-level, nonstrenuous duties at work. I do not accept the appellant's contention that he did not realize that climbing a ladder to work on his home construction project violated his medical restrictions, when for 18 months he had not been able to climb a ladder at work because of those same restrictions. The OWCP form he signed at the time of his injury stated that he must not violate any medical

restrictions on or off the job. *See* AF, Tab 4, Subtab 4uu. I thus find that the appellant had notice that his off-duty activities were not permissible. I further find that the deciding official thoughtfully and fully explained the basis for his decision to impose a lengthy suspension, rather than removal, in this case, and that his decision was well within the bounds of reasonableness. *See, e.g., Bahrke*, 98 M.S.P.R. at 522; *Ludlum*, 87 M.S.P.R. at 69; *Beck*, 67 M.S.P.R. at 224-25.

The appellant asserted in his pleadings that the deciding official violated the appellant's rights to due process because he considered material outside the scope of the notice of proposed removal, but I find this claim without merit. The deciding official appropriately considered all the record evidence in determining the issues of proof of the specifications, existence of nexus, and reasonableness of the penalty. Indeed, he painstakingly compared the numerous medical notes and reports with the evidence resulting from the investigation of the appellant's off-duty activities to conclude that the appellant had violated his medical restrictions but nevertheless had the potential for rehabilitation and return to work as a productive and critically needed employee. The appellant's rights to due process were not violated. There is no question that he was fully apprised of the charges against him and given a full opportunity to defend himself. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/
Sarah P. Clement
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **April 10, 2007**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the

Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached document was sent as indicated this day to each of the following:

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March 6, 2007
(Date)

Clarinda Risher
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